

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1078 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

SAVITABEN JAYANTILAL SHAH DECEDTHRO' HEIRS PANKAJ J SHAH & 2

Versus

KIRITKUMAR BHALCHANDRA PASAWALA

Appearance:

MR MB GANDHI for Petitioners

MR PRANAV G DESAI for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT

Date of decision: 06/08/96

ORAL JUDGEMENT

The petitioners have challenged the judgment and decree of eviction passed by the appellate Bench of the Small Causes Court, at Ahmedabad, in Civil Appeal No.11/87

passed, on 26.4.96, setting aside the judgment and decree passed in H.R.P. Suit No.928/82, and directing the petitioner to hand over the vacant and peaceful possession of the demise premises, by filing this revision under section 29(2) of the Bombay Rents, Hotels and Lodging House Rates Control Act, 1947 (Bombay Rent Act).

The respondent is the original plaintiff and landlord of the demise premise consisting of one room and kitchen situated on the ground floor of bungalow No.50 in Jitendra Park Cooperative Housing Society Limited, Narayannagar Road, Paldi, Ahmedabad, who instituted the above suit for recovery of arrears of rent and vacant possession of the demise premises on the following grounds:

- (1) Non-payment of rent;
- (2) Acquisition of suitable alternative accommodation;
- (3) Sub-tenancy or assignment of tenancy rights; and
- (4) Nuisance and annoyance.

The respondent is the original plaintiff who acquired the title in respect of the entire property of bungalow No.50 on 5.6.80, wherein, original defendant No.1 Savitaben was a sitting tenant at the rate of Rs.80 per month. Originally, her husband Jayantilal Shah was the tenant and after his death Savitaben was accepted as tenant and she continued as tenant even after the purchase of the property by the respondent-landlord.

The respondent-original-plaintiff, inter alia, contended in the plaint that original defendant No.1, Savitaben, was in arrears of rent from 5.6.80 and inspite of various demands and even a notice, no payment was made. It was also contended that defendant No.1, Savitaben, and her son had constructed a large bungalow in Champapuri Co-op. Housing Society Limited near Prabhudas Thakkar College, Paldi, Ahmedabad and they had gone to reside in the said bungalow. Thus, it was the contention of the plaintiff-landlord that the tenant has acquired suitable alternative accommodation. The plaintiff also pleaded that the original defendant Savitaben, has unlawfully sublet or assigned the interest of the suit premises to defendants Nos.2 & 3. It was also the case of the plaintiff-landlord that the sub-tenants were guilty of conduct amounting to nuisance and annoyance.

The defendants jointly submitted written statement Ex.8 wherein they denied all the allegations made in the plaint. It was also contended that agreed rent of Rs.80 per month is excessive and standard rent should be fixed. The grounds stated for eviction in the plaint are denied.

The Trial Court, in view of the facts and circumstances and the pleadings between the parties raised issues at Ex.23. On examination of facts and circumstances and the evidence on record, the Trial Court dismissed the suit for possession holding that there was no case for eviction. The issue of standard rent was not pressed. However, the Trial Court fixed the agreed rent of Rs.80 per month, inclusive of all taxes per month.

The refusal of decree for possession and dismissal of suit for eviction by the judgment and decree of the Trial Court dated 22.12.86 were challenged by the respondent-landlord by filing Civil Appeal No.11/87 before the appellate Bench of the Small Causes Court at Ahmedabad which came to be allowed on 26.4.96 and the judgment and decree recorded in the H.R.P. Suit No.928/82 came to be quashed and set aside. The petitioners herein and original defendants were directed to hand over vacant and peaceful possession of the suit premises to the plaintiff and to pay an amount of Rs.80 per month way of mesne profit. Being aggrieved by the said judgment and decree passed in appeal, the original defendants have now come up before this Court challenging the legality and validity by filing this revision invoking the aids of the provisions of section 29(2) of the Bombay Rent Act.

The learned advocate for the petitioners original defendants has seriously criticised the judgment and decree passed by the appellate Bench. Firstly, he contended that there was no case for eviction on the ground of non-payment of rent either under section 12(3)(a) or 12(3)(b) of the Bombay Rent Act. This submission is seriously controverted. Section 12 of the Bombay Rent Act reads as under:

"12. (1) A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act.

- (2) No suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in section 106 of the Transfer of Property Act, 1882.
- (3) (a) Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court may pass a decree for eviction in any such suit for recovery of possession.
- (b) In any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court.
- (4) Pending the disposal of any such suit, the Court may out of any amount paid or tendered by the tenant pay to the landlord such amount towards payment of rent or permitted increases due to him as the court thinks fit.

Explanation -- In any case where there is a dispute as to the amount of standard rent or permitted increases recoverable under this Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court."

Section 12 of the Bombay Rent Act is a substantive section giving protection to the tenant against ejectment. It does not in positive terms create any new rights in the tenants. As such, the provisions of section 12 are really restriction upon the general law to the extent it restricts the general law against the interest of the landlord. It could be safely said that the provisions of section 12 afford protection to the tenant. It creates a restriction on the landlord's right to recovery of possession. It imposes restrain upon a landlord's desire to earn higher rent and prevent him from recovering possession of his premises just for that purpose. Obviously, therefore, the Court is debarred from passing of decree for possession in favour of the landlord so long as the tenant pays or is ready and willing to pay standard rent and permitted increases and observe the conditions laid down in section 12(1).

Section 12(3)(a) provides ground for ejectment in favour of the landlord on the ground of non-payment of rent on satisfaction of the following conditions :

- (1) Rent is payable by the month;
- (2) There is no dispute about the standard rent and permitted increases;
- (3) There are arrears of rent or permitted increases for a period six months or more;
- (4) Notice under section 12(2) demanding any such arrears is served upon the tenant;
- (5) The tenant fails to pay the standard rent and permitted increases for such period within a period of one month after receipt of the notice under section 12(2).

It is true that all the aforesaid conditions must exist. If the tenant neglects to pay the arrears of rent within the stipulated period of one month in absence of dispute of standard rent or permitted increases after the service of notice under section 12(2) and when the rent is payable by month and on fulfillment of the aforesaid conditions, the Court is obliged to pass the decree for possession.

In the present case, there is no dispute about the fact that rent was in arrears from 5.6.80. Notice under section 12(2) demanding arrears of rent for more than six months was served and it was received by the tenant. A

copy of the notice is at Ex.35. It is dated 15th January, 1982. Rent is demanded in notice from June 1980 at the rate of Rs.80 per month. The tenant replied to the notice which is produced at Ex.42. It is dated 21.1.82. No dispute of standard rent was raised even in the reply to the notice. Dispute of payment of rent raised by the tenant was not believed by the appellate Court. In view of the aforesaid facts and circumstances, the appellate Court was justified in passing the decree for eviction on the ground of arrears of rent under section 12(3)(a) as all the material conditions attracting the rigours thereof came to be satisfied.

Alternatively, even if the case falls under section 12(3)(b), then also, the tenant has not been able to claim the protection of the statutory umbrella of the provisions of section 12(3)(b) in the light of the facts and circumstances of the present case. Section 12(3)(b) will be attracted on fulfillment of the following conditions or in other words, section 12(3)(b) will be applied to the following cases :

- (1) Where the arrears of rent was for less than six months,
- (2) Where the rent maybe payable yearly, quarterly or weekly or daily, or
- (3) Where a dispute about the standard rent or permitted increases had been realised by an application for that purpose within one month of the receipt of notice or demand given pursuant to sec.12(2),
- (4) Where there was a dispute between the parties regarding the amount of arrears of rent ora dispute about deductions from the rent.

Assuming that the case was covered by the provisions of section 12(3)(b) of the Bombay Rent Act, then the condition laid down in section 12(3)(b) of the Bombay Rent Act must be observed by the tenant so as to seek protection from eviction. Following conditions for relief to defaulting tenant must be established:

- (1) On the first date of hearing of the suit for eviction on the ground of non payment of rent, or on or before such other date, as the court may fix, on the application of the tenant, the tenant paid the past arrears of rent and permitted increases then due to the landlord, as may be

directed by the Court;

(2) The tenant must continue to pay regularly during the pendency of the suit, such rent and permitted increases periodically, as the Court may specify; and

(3) The tenant must pay the cost of the suit, if directed by the Court.

The aforesaid conditions are laid down with a view to seeing to give relief and provide statutory umbrella to the defaulting tenant from the extreme penalty of eviction decree to which he may be, otherwise, subjected to.

In view of the aforesaid facts and circumstances of the present case, the tenant has failed to avail the benefit of section 12(3)(b). He has admittedly not paid the arrears of rent on or before the first date of hearing. It is a settled proposition of law that the date of framing of issue is the date of first hearing, if the matter is not earlier heard. The date of framing of issue was 11.1.85. It is an admitted fact that no amount of rent was paid or deposited by the tenant on the first date of hearing. The tenant, for the first time, declared by giving a purshis Ex.60 dated 6.10.86 that the tenant had deposited the rent on 27.2.85 and it was also not the full amount then fell due. No request was made to the Court to extend the time. On the first date of hearing, like that, the day on which the issue came to be framed on 11.1.85, defendant-tenant was in arrears of rent to the tune of Rs.4400/- being the rent for 55 months. Thus, on the first date of hearing, the defendant-tenant was found in arrears of rent for the full amount then due. Therefore, the defendant is liable to be evicted on that ground. It is also found from the record that the defendant had also not deposited the amount of rent as and when fell due during the pendency of the appeal. Thus, not only the tenant was in arrears of rent for more than six months on the date of notice even on the date of first hearing and suit but even during the pendency of appeal. Consequently, the tenant would not be entitled to claim the protection and the statutory umbrella provided under section 12(3)(b) of the Bombay Rent Act. Therefore, the tenant is liable to be evicted on that ground.

The contention was raised on behalf of the tenant that the landlord had purchased the property in 1982 and, therefore, he was not entitled to claim the arrears of

rent as rent. This submission cannot be accepted, firstly, on the ground that it came to be raised for the first time in the revision. It is not a pure question of law. It is a mixed question of law and fact requiring factual investigation. Therefore, it cannot be permitted to be raised at the stage of revision. Secondly, the said submission is not sustainable in view of the evidence on record that the landlord had purchased bungalow No.50 inclusive of the demise premises by registered sale deed dated 5.6.80. This specific averment came to be made in notice under section 12(2). The tenant was informed to pay the arrears of rent from 5.6.80. Merely because the house could not be transferred in the name of the landlord until 1982 in the record of rights would not be a ground to hold that he was not the purchaser and not entitled to the arrears of rent. It is true that under the provisions of Transfer of Property Act, pre-transfer rent can be claimed as a debt and not as a rent. In view of the provisions of section 6 and 109 of the Transfer of Property Act, 1884, transferee is not entitled to pre-transfer rent in the form of rent. Pre-transfer rent is a debt and not rent and thus can be recovered only under the provisions of section 3 of the Transfer of Property Act and not under the Bombay Rent Act. So is not the factual scenario here. The landlord purchased the property on 5.6.80 and rent is claimed from that date. Therefore, the demand of arrears of rent made by the landlord in his notice under section 12(2) of the Bombay Rent Act and subsequent suit for the arrears of rent could not be said to be incompetent. The contention, therefore, that the landlord is not entitled to arrears by way of rent, but by way of debt is meritless and therefore, it is rejected. This Court has no hesitation in finding that the decree recorded by the appellate court for possession on the ground of arrears of rent against the petitioners-original defendants is quite justified and is required to be confirmed.

The second contention raised on behalf of the tenant is that there is no acquisition of suitable alternative accommodation. Passing of decree under section 13(1)(1) of the Bombay Rent Act is also, seriously, commented. Section 13(1)(1) provides a ground for eviction to the landlord if the tenant has built, acquired or allotted suitable residence.

Section 13(1)(1) of the Bombay Rent Act is designed to see that the tenant should not have more than one residential premises. The Legislature has rightly in its wisdom anticipated further shortage of residential

premises and increasing need for such accommodation. By giving a right to the landlord to resort to the provisions of section 13(1)(1), the Legislature intended that if the existing tenant vacates the premises, the same could be available to another needy person waiting in queue to have a roof over his head. It could be taken by way of judicial notice that this is a country where millions of people are struggling for suitable residential accommodation. It is in this context, the provisions of section 13(1)(1) have been devised and designed. No person should be allowed to raise a plea that the tenancy rights cannot be lost merely on acquisition of or allotment of another residence. Section 13(1)(1) provides only in case of residential premises. The underlying purport and purpose in enacting such a healthy and wholesome provision is to see that the tenant should not stick to the premises, lock the premises or hand it over to a third person alleging his intention to return after a lapse of a number of years. If such a plea is permitted, it will defeat or frustrate the purpose and object of section 13(1)(1). Therefore, the Courts have repeatedly emphasized such policy while interpreting such provisions of the rent legislations. While emphasizing the public policy underlying such provisions, the courts have further laid down that the parties cannot contract out of the statute. In fact, clause (1) of section 13(1) has been deliberately restricted to residential premises which serve as a roof over the head of the tenant. This provision is made with the object of preserving and developing the economy of the society. This aspect emphasizes that the legislature has taken into account the needs of the tenant and his welfare also. The expressions 'has built', 'has been allotted' and 'has acquired' also restrict the scope and ambit of this clause. The Courts, therefore, must reject the device or design by the tenant to defeat the healthy object of the said provision incorporated in section 13(1)(1) of the Bombay Rent Act.

In the present case, the landlord has successfully established that the tenant has acquired a suitable alternative accommodation. The demise premises are consisted of one room and kitchen whereas the original defendant No.1 has acquired a very big bungalow having four bed rooms. The original defendant No.1, tenant Savitaben and her son bidding good-bye to the rented premises started residing in the new premises leaving the same to the married daughter and son-in-law. This very act of the tenant in allowing the married daughter and son in law to occupy and going and enjoying bigger and better premises would ipso facto attract the rigours or

transfix the rigours of ejectment from the demise premises falling within the four corners of the provisions of section 13(1)(1). There is no dispute about the fact that the tenant has constructed a bungalow of four bed rooms in Champapuri Society. Of course, it is in evidence that it was constructed by the son of defendant No.1 Savitaben. Be that as it may. It can be safely be concluded from the evidence on record that the deceased tenant Savitaben who was residing with her son Pankaj has gone to stay in the bungalow in Champapuri Society which is consisted of four bed rooms. It cannot be disputed even for a moment that the new bungalow is not suitable. It is bigger and better. Who constructed the bungalow and how is it constructed would not be very material while examining the provisions of section 13(1)(1). The emphasise laid down by the Legislature on the expression is that a tenant has either built, or acquired or who is allotted suitable residence. Nobody can be allowed to encourage the policy of dog in the manger when millions are aspiring for housing accommodation and waiting in queue. In the circumstances, bearing in mind the factual scenario emerging from the record of the present case and the purpose and design with which the provisions of section 13(1)(1) are made, this Court has no hesitation in holding that the tenant is liable to be ejected on the ground of section 13(1)(1) of the Bombay Rent Act for acquiring suitable alternative accommodation. Therefore, eviction decree on this count is fully justified.

The eviction decree is also earned by the landlord in an appeal on the ground of sub-tenancy under section 13(1)(e) read with section 15 of the Bombay Rent Act. since the Appellate Court has recorded a finding of fact that the original defendant No.1 tenant after leaving the demise premises and residing in the newly constructed bungalow let the demise premises to the married daughter and son-in-law which is an action amounting to sub-letting, or transfer or assignment cannot be questioned in a revision under section 29(2) of the Bombay Rent Act wherein the jurisdictional scope is very much circumscribed. The petitioners have not been able to show that the finding of the appellate Court recorded on appreciation and analysis of the facts and granting of ejectment decree under section 13(1)(e) read with section 15 of the Bombay Rent Act is in any way unjust, perverse or illegal. Therefore, the said finding and conclusion is required to be confirmed. Accordingly it is confirmed. It may be mentioned that the decree was also sought on the ground of nuisance and annoyance which was not accepted by the Trial Court as well as by the

Appellate Court. It is also not agitated before this Court. Therefore, that question also would not survive.

Having regard to the facts and circumstances enumerated hereinbefore and in the light of the evidence, copies whereof were supplied and bearing in mind the aforesaid proposition of law, this Court is satisfied that the eviction decree granted to the landlord, respondent herein against the petitioners original defendants under section 12(3)(a) and 13(1)(1) and 13(1)(e) is fully justified requiring no interference by this Court in a revision under section 29(2) of the Bombay Rent Act and the Court is left with no alternative but to reject this petition at the threshold. Accordingly, it is rejected at the admission stage with no order as to costs. Notice discharged. Ad interim relief granted earlier stands vacated.

At this stage, the learned counsel for the petitioners original defendants requests for granting reasonable time for vacating the premises. In the light of the facts and circumstances, it would be just and appropriate to grant time to vacate the premises until April 30, 1997 on the following conditions:

(1) That all the petitioners shall give an undertaking that the demise premises shall not be transferred or handed over to anybody and will be handed over only to the respondent No.1 original plaintiff landlord on April 30, 1997. Time to file an undertaking is given till 30th September, 1996.

(2) That the petitioners shall pay or deposit the mesne profit at the rate equivalent of the amount of rent regularly on or before 10th of succeeding month and also pay full arrears of rent on or before 31st August, 1996.

It will be open for the respondent original plaintiff to withdraw the amount deposited in the Trial Court.

In view of the aforesaid directions, interim relief, obviously, shall not survive except that the decree for possession shall not be executed by the respondent original plaintiff till 30th April, 1997.

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